

- A **KHAERYLL BENJAMIN IBRAHIM**
- v.
- B **KETUA POLIS NEGARA & ORS**
- HIGH COURT MALAYA, KUALA LUMPUR
SOFIAN ABD RAZAK J
[CRIMINAL APPLICATION NO: 44-99-2010]
31 MAY 2010
- C **ADMINISTRATIVE LAW:** Remedies - Habeas corpus - Impropriety of arrest - Applicant charged under s. 12(3) Dangerous Drugs Act 1952 and freed on bail - Whether rearrest and detention of applicant under s. 3 Dangerous Drugs Act (Special Preventive Measures) 1985 lawful - Whether habeas corpus to be granted
- D **CONSTITUTIONAL LAW:** Fundamental liberties - Habeas corpus - Impropriety of arrest - Applicant charged under s. 12(3) Dangerous Drugs Act 1952 and freed on bail - Whether rearrest and detention of applicant under s. 3 Dangerous Drugs Act (Special Preventive Measures) 1985 lawful - Whether habeas corpus to be granted
- E **CRIMINAL PROCEDURE:** Habeas corpus - Affidavit - Whether mandatory for applicant to affirm affidavit in support of habeas corpus application - Whether affidavit could be affirmed by mother and personal assistant of applicant - Whether applicant unable to affirm affidavit due to restraint or coercion or other sufficient cause - Criminal Procedure Code, s. 367
- F **CRIMINAL PROCEDURE:** Habeas Corpus - Application for - Whether 2nd and 3rd respondents wrongly named as detaining authority - Actual custody of applicant with 1st respondent - Whether habeas corpus application made against appropriate detaining authority
- G **CRIMINAL PROCEDURE:** Habeas corpus - Dangerous Drugs Act (Special Preventive Measures) 1985, s. 3 - Applicant charged under s. 12(3) Dangerous Drugs Act 1952 and freed on bail - Whether rearrest and detention of applicant under s. 3 DD (SPM) Act 1985 lawful - Whether holding of press conference by police whilst investigation was still ongoing showed mala fide
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PREVENTIVE DETENTION: *Detention - Grounds for detention - Whether justified - Applicant charged under s. 12(3) Dangerous Drugs Act 1952 and freed on bail - Whether rearrest and detention of applicant under s. 3 Dangerous Drugs Act (Special Preventive Measures) 1985 lawful - Whether habeas corpus to be granted*

Khaeryll Benjamin Ibrahim (“the applicant”) and another person were arrested on 11 March 2010 and on 12 March 2010. The police produced them before the magistrates’ court to obtain a remand order for seven days to enable the police to complete its investigation pursuant to s. 39B Dangerous Drugs Act 1952 (‘the DDA 1952’). On 17 March 2010, the learned Senior Registrar granted the police an extension of the remand order for a further seven days. On 25 March 2010 the applicant was produced before the magistrates’ court and charged for possession of 0.24 grams of methamphetamine pursuant to s. 12(3) of the DDA 1952. The applicant claimed trial to the said charge and the learned Magistrate allowed bail at RM2,000 with one surety. At about 2pm, bail was posted and as the applicant and his family members were leaving the court registry office, the applicant was rearrested pursuant to s. 3 Dangerous Drugs Act (Special Preventive Measures) 1985 (‘DD (SPM) Act 1985’). The applicant applied for a writ of *habeas corpus ad subjiciendum* and a declaratory relief that the re-arrest on 25 March 2010 was unlawful and *ultra vires*. The applicant claimed for: (i) a declaration that the applicant’s arrest and detention under s. 3 or any other provision of the DD (SPM) Act 1985 was unlawful; (ii) for a writ of *habeas corpus* to be issued for the applicant to be released forthwith; and (iii) for an order that the applicant not be re-arrested. The learned senior federal counsel raised two preliminary issues as follows: (i) whether the 2nd and the 3rd respondents respectively were properly cited as a party detaining and having custody over the applicant for the purposes of this application for *habeas corpus*; and (ii) whether the mother and the personal assistant of the applicant in law could affirm affidavit in support notwithstanding the applicant himself had already been filed the affidavit in support. After submissions by both parties, the court adjourned the matter for decision to 5 May 2010. However on 5 May 2010 the court was informed that the Honourable Minister had issued a detention order pursuant to s. 6(1) of the DD (SPM) Act 1985 on 4 May 2010.

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A Held (dismissing the applicant's application):

- (1) The 2nd and the 3rd respondents had been improperly and inappropriately named as the detaining authority in the *habeas corpus* application. The 1st respondent had the actual custody of the applicant. Section 366 of the Criminal Procedure Code (CPC) imposes a mandatory obligation that *habeas corpus* application shall be supported by an affidavit stating where and by whom the person is detained which confines the purpose of the said application to the appropriate detaining authority. (para 51)
- (2) On the proper interpretation of s. 367 of the CPC, it is mandatory for the applicant to affirm an affidavit in support of his *habeas corpus* application unless it was shown that by reason of restraint or coercion or sufficient cause that he is unable to make it. This exception which permits a person other than the detainee to affirm affidavits in view of the difficulties that may be encountered thus permitting such affidavits to contain hearsay material must be strictly construed. There were no valid reasons to convince the court that the applicant was restrained or coerced or that there were other sufficient cause that the applicant was unable to make it. (para 53)
- (3) The re-arrest of the applicant immediately after bail was posted for the charge of possession of 0.24 grams of methamphetamine pursuant to s. 12(3) of the DDA 1952 did not in any way violate the provision of s. 3(1) of the DD (SPM) Act 1985. (para 59)
- (4) The rearrest and the detention of the applicant and the holding of the press conference by the police whilst the investigation was still on going did not in any way establish the *mala fide* on the part of the detaining authority. There was no affidavit by the applicant to show that the police investigation was not vigorously pursued. In fact on affidavit evidence it showed the genuine effort by the police to curb drugs related activities which fall within the scope of DD (SPM) Act 1985. (paras 74 & 75)
- (5) The arrest and detention of the applicant was lawful and in compliance with all the provisions of the Constitution and the Dangerous Drugs (Special Preventive Measures) Act 1985. (para 76)

Case(s) referred to:

- Abdul Ghani Haroon v. Ketua Polis Negara & Anor Application* (No 4) [2001] 3 CLJ 606 HC (**refd**) A
- Aminah v. Superintendent of Prisons, Pengkalan Chepa, Kelantan* [1967] 1 LNS 5 HC (**refd**)
- Andrew Thamboosamy v. Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 1 LNS 5 FC (**refd**) B
- Christie & Another v. Leachinsky* [1947] 1 All ER 567 (**refd**)
- Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645 FC (**refd**)
- Darna Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300 FC (**refd**)
- Kam Teck Soon v. Timbalan Menteri Dalam Negeri Malaysia & Ors And Other Appeals* [2003] 1 CLJ 225 FC (**refd**) C
- Karpal Singh v. Inspector General of Police & Ors* [1989] 1 CLJ 134; [1989] 1 CLJ (Rep) 50 SC (**refd**)
- Karpal Singh v. Menteri Dalam Negeri Malaysia & Anor* [1988] 1 CLJ 197; [1988] 1 CLJ (Rep) 632 HC (**refd**) D
- Lee Kew Sang v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 3 CLJ 914 FC (**refd**)
- Lim Kean Hong v. Timbalan Menteri Dalam Negeri Malaysia & Another Case* [1990] 1 CLJ 1161; [1990] 2 CLJ (Rep) 378 HC (**refd**)
- Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309 FC (**refd**) E
- Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 4 CLJ 613 FC (**refd**)
- Mohd Nazir Badar Shair v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2000] 2 CLJ 805 HC (**refd**)
- Motilal v. State of Bihar* [1968] SC 1509 (**refd**) F
- Muhammad Jailani Kasim v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 4 CLJ 687 FC (**refd**)
- Palautah Sinnapayan & Anor v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2010] 2 CLJ 133 FC (**refd**)
- Rajoo Ramasamy v. Inspector General of Police & Ors* [1990] 1 CLJ 888; [1990] 1 CLJ (Rep) 256 SC (**refd**) G
- Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min* [1976] 1 LNS 129 FC (**refd**)
- Re Tan Boon Liat & Anor; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors And Other Appeals* [1977] 1 LNS 110 FC (**refd**)
- Syed Ali Mohamed Kutti v. Menteri Dalam Negeri Malaysia & Anor* [1997] 1 LNS 377 HC (**refd**) H
- Uthayakumar Ponnusamy v. Menteri Keselamatan Dalam Negeri Malaysia & Anor* [2009] 1 CLJ 546 HC (**refd**)
- Wong Fook Nyen v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [1988] 2 CLJ 274; [1988] 2 CLJ (Rep) 543 HC (**refd**)
- Yeap Hock Seng v. Minister for Homes Affair, Malaysia & Ors* [1975] 1 LNS 199 HC (**refd**) I

A Legislation referred to:

Criminal Procedure Code, ss. 28A, 117, 302, 366, 367

Dangerous Drugs Act 1952, ss. 12(2), (3), 39B

Dangerous Drugs Act (Special Preventive Measures) 1985, ss. 3(1), (2)(a), (b), (c), 6(1)

B Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(1), 4(1)

Federal Constitution, arts. 5(2), (3), 7(2)

Internal Security Act 1960, ss. 8, 73

Interpretation Acts 1948 and 1967, s. 62

C *For the applicant - Amer Hamzah Arshad; M/s Zain Co*

For the respondents - Najib Zakaria SFC (Mahmud Abdullah & Zafran Zafri SSFC with him) AG's Chambers

Reported by Amutha Suppayah

D**JUDGMENT****Sofian Abd Razak J:**

- E** [1] This is an application (encl. 4) by Khaeryll Benjamin Ibrahim (hereinafter called 'the applicant') for a writ of *habeas corpus ad subjiciendum* and a declaratory relief that the re-arrest on 25 March 2010 was unlawful and *ultra vires*. The application was filed in court on 8 April 2010 on a certificate of urgency whereupon the hearing
- F** was fixed on 21 April 2010 but was adjourned to 26 April 2010 to enable the respondents to file in their affidavits in reply and also for both parties to prepare for the hearing. The hearing was fixed for three consecutive days from 26, 27 and 28 April 2010 and after lengthy submissions by both parties, the court adjourned the matter
- G** for decision to 5 May 2010.

- [2] The applicant was at the hearing of his application being detained pursuant to s. 3(1) of the Dangerous Drugs Act (Special Preventive Measures) 1985 (hereinafter called the 'DD (SPM) Act 1985').

H**Factual Background Of The Case**

- [3] Applicant and one other person named Afifi binti Hamid were arrested on 11 March 2010 at about 2.15pm in the afternoon at the car park 1st Floor, Block A, Menara Duta 2, Jalan 1/38 Off Jalan Segambut, Kuala Lumpur. Upon a body search done, the police did
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not find any item which contravened the law except house keys. Further to that on the same day at about 3pm in the afternoon the police were brought by the applicant to a condominium at No C-13-6 Vista Mutiara, 51200 Off Jalan Ambong Kiri, Kepong Baru, Kuala Lumpur (hereinafter called the 'Condo Vista Mutiara') a place suspected of being used for processing drugs. At the Condo Vista Mutiara, the police found equipments suspected of being used in the processing of drugs. The police found two plastic packets of 0.61 gram of syabu on a table in the hall and also found in the shoe rack a red plastic the contents therein weighing 867.35 grams suspected drugs namely cocaine. At about 4pm in the afternoon on the same day, the applicant brought the police to an address at A-6-5 Menara Duta 2, Jalan 1/38, Off Jalan Segambut, Kuala Lumpur a place suspected of being used for processing drugs. The police found a plastic packet the contents therein was white crystal suspected of being drugs weighing 0.87gram.

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[4] On 12 March 2010, the police produced the applicant and Afifi binti Hamid before the magistrate's court, Kuala Lumpur to obtain a remand order for seven days to enable the police to complete its investigation pursuant to s. 39B Dangerous Drugs Act 1952 (hereinafter called 'the DDA 1952'). On 17 March 2010, the learned Senior Registrar of the magistrate's court granted the police an extension of the remand order for a further seven days. On 25 March 2010 at about 11.30am, the applicant was produced again before the magistrate's court (Criminal 4) *vide* Arrest case No: 4-83-2265-2010 and charged for possession of 0.24 grams of methamphetamine pursuant to s. 12(3) of the DDA 1952. The applicant claimed trial to the said charge and the prosecution offer bail of RM3,000 and after hearing submissions from both parties, the learned magistrate allowed bail at RM2,000 with one surety. At about 2pm, bail was posted and as the applicant and his family members were leaving the registry office on Tingkat B1, Court Complex Kuala Lumpur, the applicant was rearrested pursuant to s. 3 DD (SPM) Act 1985. It was upon the re-arrest of the applicant that precipitated the filing of this application.

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[5] Relief sought by the applicant in the application herein are:

- i) for a declaration that the applicant's arrest and detention under s. 3 or any other provision of the DD (SPM) Act 1985 is unlawful;

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- A ii) for a writ of *habeas corpus* to be issued for the applicant to be released forthwith;
- iii) for an order that the applicant not to be re-arrested.
- B [6] At the outset of the proceeding, Encik Mahmud Abdullah the learned senior federal counsel (hereinafter called ‘the learned SFC’) for the respondents stood up and informed the court that he would be raising two preliminary issues before arguing on the merits of the application. The two issues are as follows:
- C i) The first issue concerns the question of whether the 2nd and the 3rd respondents respectively are properly cited as a party detaining and having custody over the applicant for the purposes of this application for *habeas corpus*;
- D ii) The second issue concerns the question of whether the mother and the personal assistant of the applicant in law could affirm affidavit in support notwithstanding the applicant himself had already filed the affidavit in support.
- E [7] The court on the preliminary issues directed that it be argued as part of the other issues and argued as it comes along and not treated as preliminary issues *per se* and not having the court to decide on it first. Now that the two preliminary issues have been made known, learned counsel for the applicant will submit on it as it comes along.
- F [8] The crux of encl. 4 requires the court to determine whether the applicant’s arrest and detention under s. 3 DD (SPM) Act 1985 was lawful. As for the respondents the following issues are for the court’s determination namely:
- G i) whether there was unlawful arrest when there was failure to inform the applicant the reasons for the arrest;
- ii) remand order by the learned magistrate pursuant to s. 117 CPC;
- H iii) failure to inform the applicant of his right to be represented by counsel and the right to be represented by counsel of his choice;
- I iv) Non-compliance with s. 28A of the CPC;

- v) applicant was not given the medical treatment while in detention; A
- vi) was the re-arrest of the applicant shrouded with *mala fide* after he has posted bail for a charge pursuant to s. 12(2) of the DDA 1952. B

Submission By Learned Counsel For The Applicant

[9] The learned counsel for the applicant, En Amer Hamzah, began his submission by alluding the court to a well established canon of interpretation that any preventive law must be construed strictly and in the case of doubt, the court should lean in favour of the subject. The power to arrest and detain a person without the safeguard of a court trial is too drastic to allow a lenient and liberal interpretation. The courts must be vigilant and astute to ensure that the detaining authority does not transgress or violate the safeguards provided by law for the protection of citizens. C D

[10] Learned counsel cited two cases to fortify his argument that is the case of *Motilal v. State of Bihar* [1968] SC 1509 where the Indian Supreme Court in holding that the detention of the petitioner as illegal made the following observations namely: E

Individual liberty is a cherished right, one of the most valuable fundamental rights guaranteed by our Constitution to the citizen of this country. If that right is invaded, excepting strictly in accordance with law, the aggrieved party is entitled to appeal to the judicial power of the State for relief. We are not unaware of the fact that the interest of the society is no less important than that of an individual. Our Constitution made provisions for safeguarding the interest of the society. Its provisions harmonize the liberty of the individual with social interests. The authorities have to act solely on the basis of those provisions. They cannot deal with the liberty of the individual in a casual manner, as has been done in this case. Such an approach does not advance the true social interest. Continued indifference to individual liberty is bound to erode the structure of our democratic society. F G

[11] In *Andrew Thamboosamy v. Superintendent of Pudu Prisons Kuala Lumpur* [1976] 1 LNS 5; [1976] 2 MLJ 156 it was held that: H

With respect, we agree that any form of detention does violate art. 5(1) of the Constitution which reads: I

No person shall be deprived of his personal liberty save in accordance with the law.

- A And hence power given by law to detain must be construed strictly and in cases of doubt or ambiguity the court should lean in favour of the subject. Government is the most powerful body in the country and the court should be vigilant to see that Government does not exceed its power when
- B dealing with individuals. But at the same time we are of the opinion that the problem of dealing with illegal immigrants is a matter of public policy to be decided by Parliament and by the Executive, that in this matter the proper authority for enacting the necessary legislation is Parliament and that if the
- C Government exercises a power conferred on it by Parliament and keeps within the law, then the duty of the court is quite clear, the court should simply apply the law, no matter how harsh its effect may be on the immigrant. His remedy is then not judicial, but political and administrative.
- D [12] It was also submitted by learned counsel that all constitutional provisions that provide for the fundamental liberties and rights of citizens must be given its widest and most liberal interpretation and application whereas any provision in the Constitution or any law which seeks to restrict such fundamental
- E liberties and rights must be given a narrow and restricted interpretation.
- [13] In *Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min* [1976] 1 LNS 129 the Federal Court made the following observations:
- F Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by law against the improper exercise of such power must be zealously watched and enforced by the court. In a matter so fundamental and important as
- G the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorizing detention without trial must strictly construed and safeguards which the law provides for the protection of any citizen must be liberally interpreted. Where
- H the detention cannot be held to be in accordance with procedure established by law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant in applying for a writ of *habeas corpus* is entitled to avail himself of any technical defect which may invalidate the order which deprived the deponent of his liberty.

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[14] Further reference may be made to *Re Tan Boon Liat & Anor; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors And Other Appeals* [1977] 1 LNS 110, where Lee Hun Hoe CJ (Borneo) said:

In the *Reverend Thomas Petham Dale's Case* [1881] 6 QBD at pages 376, 461, 469 and 470 Brett LJ observed at page 461 that: Then comes the question upon the *habeas corpus*. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue.

Cotton LJ in supporting this stated at page 469:

I quite agree with Brett LJ, that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be matters of mere form, however the departure from the correct procedure is not in my opinion, a mere matter of form but is a matter of substance.

[15] The ground of challenge that the arrest and detention under s. 3 of DD (SPM) Act 1985 was unlawful namely:

- i) The arrest on 25 March 2010 is unlawful due to the fact that the jurisdictional facts or prerequisite for the exercise of power to arrest under s. 3(1) of DD (SPM) Act 1985 have not been fulfilled;
- ii) The arrest on 25 March 2010 is unlawful due to the fact that it is in contemptuous;
- iii) There are violations of art. 5(3) of the Constitution;
- iv) There is procedural non-compliance;
- v) That the arrest and detention was shrouded with *mala fide*.

That The Arrest On 25 March 2010 Had Not Satisfied The Prerequisite For The Exercise Of The Power To Arrest Under s. 3(1) DD (SPM) Act 1985

[16] Learned counsel referred to s. 3 of DD (SPM) Act 1985 which states as follows:

A Section 3. Power to detain suspected persons.

(1) Any police officer may, without warrant, arrest and detain for the purpose of investigation any person in respect of whom he has reason to believe there are grounds which could justify his detention under subsection (1) of section 6.

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(2) Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty days without an order of detention having been made in respect of him under subsection (1) of subsection 6:

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Provided that:

(a) he shall not be detained for more than twenty four hours except with the authority of a police officer of or above the rank of Inspector;

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(b) he shall not be detained for more than forty eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent of Police;

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(c) he shall not be detained for more than fourteen days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf and the Inspector-General or police officer so designated by him as the case may be shall forthwith report the same

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to the Minister.

Section 6: Power to order detention and restriction of persons.

(1) Whenever the Minister, after considering:

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(a) the complete report of investigation submitted under subsection (3) of section 3; and

(b) the report of the Inquiry Officer submitted under subsection (4) of subsection 5

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[17] It was the contention of the learned counsel for the applicant that for an arrest under s. 3(1) of the DD (SPM) Act 1985 to be lawful, the arresting and detaining police officer must have 'reasons to believe' that there are grounds which would justify a detention order under s. 6 of DD (SPM) Act 1985 under which the Minister would be satisfied that the applicant has been or is associated with

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any activity relating to or involving the trafficking in dangerous drugs and that the detention is necessary in the interest of public order. It is also imperative for the arresting and detaining officer to show that at the time of arrest there existed reasons for believing that the applicant has been associated with any activity relating or involving drug trafficking or that the applicant is associated with any activity relating to or involving the trafficking in dangerous drugs failing which the arrest would be unlawful.

[18] Learned counsel referred to the case of *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309 and quoted as follows:

This appears to go against the grain of s. 73(1) of the ISA as the police officer arresting anyone under the provision must have reason to believe that that person is a threat to national security and not arrest him for the purpose of building a case against him with the intention of getting enough evidence to get the Minister's order to detain him under s. 8 of the ISA. All the appellants had affirmed in their affidavits that they were never told the reasons at the time the arrest were effected.

[19] It was the contention of the learned counsel that the arresting and detaining officer had failed to satisfy the court that there were reasons to believe that there were grounds which justified the applicant's arrest. The applicant cannot be arrested for the purpose of building a case against him with the intention of getting enough evidence to get the minister's order to detain him under s. 6(1) of DD (SPM) Act 1985.

[20] The learned counsel then referred to the affidavit of DSP Baharudin (encl. 9) at para. 5 and the affidavit of Inspector Nur Hazurah (encl. 6) at para. 4, both were alleged to have categorically stated that the arrest of the applicant under s. 3(1) of the DD (SPM) Act 1985 was based upon the instruction and approval of SAC1 Dato' Ismail bin Yatim who is the Timbalan Pengarah Bahagian Jabatan Siasatan Jenayah Narkotik Bukit Aman. According to the affidavits, the instruction from SAC1 Dato' Ismail bin Yatim was communicated to DSP Baharudin on 24 March 2010, who then informed Inspector Nur Hazurah on the same date. In this regard the learned counsel for the applicant further argued that the decision maker as to why the arrest should be made was no other than SAC1 Dato' Ismail bin Yatim and therefore the court should

- A scrutinise what the reasons for believing the applicant should be arrested under s. 3(1) of the DD (SPM) Act 1985 were. SAC1 Dato' Ismail bin Yatim had not filed any affidavit stating the reasons to believe that the applicant should be arrested under s. 3(1) of DD (SPM) Act 1985 and thus an affidavit from the decision maker was necessary and failure to produce an affidavit from SAC1 Dato' Ismail bin Yatim was fatal. The burden is on the police officer to satisfy the court that the preconditions constituting the said section which set out the jurisdictional threshold requisite to the exercise of arrest and detention have been complied with.
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- C [21] There were no reasons to justify the applicant's arrest in view of the fact that the police had earlier stated on 11 March 2010 that the applicant was involved in drug trafficking activity but ACP Kang Chez Chiang at a press conference said that the police did not have reason to believe that the applicant was acting for or working with a syndicate. As such there was no reason to believe that the applicant was involved in any drug trafficking activity or that the applicant was involved in any activity which was prejudicial to public order.
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- E [22] On the definition of 'public order' learned counsel referred to the recent decision of the Federal Court in *Darma Suria Risman Salleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300 where the court held that the mere infraction of the peace or a breach of law and order, does not necessarily mean that there is a breach of the peace that leads to public disorder. The court further held that for an action to be considered as a public disorder, it must be one where it disrupts or has the potential to disrupt the even tempo of life of the community, public safety and tranquility. The court held that the mere fact that a person is involved in a car smuggling activity is not sufficient to be considered as an activity which is prejudicial to public order. However, if the activity is one which is carried out within a syndicate then it can be considered to be prejudicial to public order.
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- H [23] It is the view of the learned counsel that in the instant case, since the police had admitted that there were no reasons to believe that the applicant was involved in any syndicate, therefore there was no element of danger to public order to justify an arrest under s. 3(1) of the DD (SPM) Act 1985 and the respondents' affidavits did not pre-offer an explanation as to how the applicant can be considered as a threat to public order.
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The Arrest On 25 March 2010 Was Contemptuous

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[24] The undisputed facts were that the applicant was arrested on 25 March 2010 soon after bail of RM2,000 with one surety was posted. The arrest took place within the vicinity of the Kuala Lumpur Court Complex and it was alleged that the conduct of arresting the applicant by the police had clearly interfered with the duty as a lawyer when advising the applicant and therefore the police had acted in a manner which is contemptuous in the face of the (magistrate's) court. In *Abdul Ghani Haroon v. Ketua Polis Negara & Anor Application (No 4)* [2001] 3 CLJ 606, the court held that the re-arrest of a person who had been released by the court based on the reasons of the original arrest is contempt of court.

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Violation Of Art. 5(3) Of The Federal Constitution

[25] Learned counsel contended that pursuant to art. 5(3) of the Federal Constitution where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice. It was the stance of the applicant that when he was arrested by the police, no grounds were communicated to him notwithstanding the fact that the arrest was made under s. 3(1) of the DD (SPM) Act 1985 and thus his arrest was unlawful. In *Wong Fook Nyen v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [1988] 2 CLJ 274; [1988] 2 CLJ (Rep) 543 the court held and acknowledged that even though the DD (SPM) Act 1985 is silent as regards the need to inform a person of the grounds of his arrest and that the Act was made pursuant to art. 149 of the Constitution, that does not mean that there is no requirement for the police to inform the arrested person of the grounds for his arrest. The court further held that it was a basic and elementary right of a person to be informed of the grounds for his arrest and the arresting officer arresting a person pursuant to s. 3(1) of the DD (SPM) Act 1985 must inform the person arrested of the grounds upon which he was arrested.

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[26] The learned counsel in the instant case questioned whether the mere citing of a provision of the law under which the power of arrest was exercised was sufficient to meet the requirement of art. 5(3) of the Constitution. Learned counsel submitted that all constitutional provisions that provide for the fundamental liberties and rights of citizens must be given its widest and most liberal

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- A interpretation and application whereas any provision in the Constitution or any law which seeks to restrict such fundamental liberties and rights must be given a narrow and restricted interpretation. A passage from the case of *Aminah v. Superintendent of Prisons, Pengkalan Chepa, Kelantan* [1967] 1 LNS 5 on this issue
- B is quoted by the learned counsel and is reproduced herein:

Counsel then referred to article 22(1) of the Indian Constitution, which is indeed substantially the same as our article 5(3). At page 104 of Volume 2 of the 5th Edition of Basu's Commentary on the Constitution of India under the heading "Right to be informed of the grounds" appears in the following passage:

- D Hence, though it is not necessary for the authorities to furnish full details of the offence, sufficient particulars must be furnished to enable the arrested person to understand why he has been arrested. The ground to be communicated to the arrested person should be somewhat similar to the charge by the court for the trial of a case. Thus merely to inform the person that he has been arrested under section 7 of the Criminal Law Amendment Act 1932, without giving any particulars of the alleged acts for which such action has been taken against him is not sufficient compliance with article 22(1).
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- [27] In *Christie & Another v. Leachinsky* [1947] 1 All ER 567, the House of Lords ruled that an arrest without warrant, either by a policeman or by a private person, can be justified only if it is an arrest on a charge which is made known to the person arrested unless the circumstances are such that the person arrested must know the substance of the alleged offence.
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- [28] It was the contention of the learned counsel for the applicant that when the police arrested the applicant in the Kuala Lumpur court Complex, the police did not provide any grounds for his arrest. It was further contended by the applicant that no grounds were communicated to him when he was arrested save for the fact that some officers mentioned that the applicant was arrested under s. 3(1) DD (SPM) Act 1985.
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Denial Access To Counsel

- [29] It was also the contention of the learned counsel that the applicant had been denied legal access in contravention of art. 5(3) of the Constitution. Such denial, especially after the applicant was
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arrested on 25 March 2010, coupled with the aforesaid grounds submitted earlier would inevitably lead to the applicant's detention being unlawful.

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Procedural Non-compliance

[30] The learned counsel for the applicant argued that under s. 3(2) of DD (SPM) Act 1985 to be lawful, the detention must be authorized to senior police officers from the moment the applicant was arrested. Based on this fact, it was submitted that for all intents and purposes the investigation under s. 3(1) of DD (SPM) Act 1985 had already commenced even before 25 March 2010 when Inspector Prakhphat interviewed the applicant. Failure to comply with such requirement would render the detention to be bad in law and unlawful.

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Mala fide

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[31] In *Karpal Singh v. Timbalan Menteri Dalam Negeri Malaysia & Anor* [1988] 1 CLJ 197; [1988] 1 CLJ (Rep) 632 the word '*mala fide*' was defined as a power which is exercised for a collateral or ulterior purpose for which it is professed to have been exercised.

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In the instant case the applicant was initially arrested on 11 March 2010 not because the applicant had done or was doing something which can be detrimental to public order. The danger was non-existence and the need for him to be arrested under s. 3(1) of DD (SPM) Act 1985 did not arise and the purpose of the police from the beginning was to investigate and charge him under s. 39B of the Dangerous Drugs Act 1952. The police admitted that there were lack of evidence to charge the applicant for drug trafficking, consequently the detention under s. 3(1) DD (SPM) Act 1985 the contingency plan to salvage the image and reputation of the police. The learned counsel cited *Mohamad Ezam (supra)* where the court held that when a power was exercised for collateral or ulterior purpose for which it is professed to have been exercised, then such exercise of the power is *mala fide*.

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[32] The learned counsel for the applicant then proceeded to reply to the submissions by the learned SFC En. Mahmud Abdullah on the two issues raised by way of preliminary point namely:

- i) whether the 2nd and 3rd respondents were properly named as respondents in this proceeding as both were not in physical

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- A possession of the applicant and as such is not in compliance with the 1st pre-condition of s. 366 of the Criminal Procedure Code (hereinafter called ‘the CPC’).
- B It was the contention of the learned counsel that s. 366 of the CPC does not in any way limit or preclude the applicant from naming only the detaining authority as parties to the proceedings. In any event it cannot be denied that the 1st respondent, that is the office of the Inspector - General of Police comes under the purview and/or control of the 2nd respondent that is the Home Minister and whose instructions and commands it follows. Further it cannot be denied that the 1st respondent, being a civil servant, is wholly allegiant to the 3rd respondent that is the Government of Malaysia. What is obvious here is that the element of control is present in terms of the decision-making process of whether the applicant is detained or otherwise. Whilst it is accurate to say that the applicant is not in the physical custody of the 2nd and 3rd respondents respectively, that does not mean that the 2nd and 3rd respondents, being the employer and master of the 1st respondent, have no control of actual detention and/or terms of such detention of the applicant. The 2nd and 3rd respondents may not have the physical custody of the applicant, it was submitted that both the 2nd and 3rd respondents have constructive custody over the applicant.
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- F Learned counsel then referred to chapter 1 N, 12, p. 1036 of VG Chandran’s Law of Writs, wherein it states as follows:
- G A writ of *habeas corpus* is available in all cases of wrongful deprivation of personal liberty. It may be issued against any person or authority who has been illegally obtained, arrested or confined the detenu or prisoner. It may be issued against the person who has actual or physical conduct or even constructive custody of the prisoner. It may also be issued to an authority who has control over the imprisonment who can order the release of the prisoner.
- H
- I The learned counsel for the applicant disagreed with the contention of the learned SCF for the respondents that the case of *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 4 CLJ 613 held that the writ of *habeas corpus* must be directed against the current order of detention which

is not the issue here but rather whether it is premature at this juncture to name the 2nd and 3rd respondents respectively in this proceedings.

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- ii) whether the two affidavits by the applicant's mother and personal assistant could be accepted other than the affidavit in support by the applicant;

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The learned counsel submitted that s. 366 and s. 367 of the CPC are related and the cumulative or harmonious interpretation of both sections shows that the affidavit referred to in s. 367 merely deals with an 'affidavit in support' of an application for a writ of *habeas corpus*. Both sections are silent as to the requirement or the procedure *vis-a-vis* 'affidavits in reply' and therefore there is nothing in these sections that precludes other individuals from filing any 'affidavit in reply'.

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Alternatively, it was further submitted that s. 367 of the CPC deals with an 'affidavit in reply' therefore the applicant's mother and his personal assistant were entitled to affirm their respective affidavits in response to certain facts which are within their personal knowledge. Section 367 of the CPC allows other people apart from the applicant to affirm an affidavit under two circumstances namely:

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- (i) the detained person is unable to affirm an affidavit by reason of the fact that he is being coerced or restrained; or

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- (ii) there are other sufficient causes.

Submission By The Respondents

[33] The learned SCF En Mahmud Abdullah for the respondents' submitted on the two preliminary issues mentioned in the earlier part of the applicant's submission the first was whether the 2nd and 3rd respondents were appropriately and properly made as parties in the present *habeas corpus* application.

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[34] The learned SCF referred to s. 366 of the CPC which states as follows:

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Every application to bring up before the Court a person detained on a warrant of extradition or alleged to be illegally or improperly detained in custody shall be supported by affidavit stating where and by whom the person is detained and, so far as they are known the

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- A facts relating to the detention, with the object of satisfying the Court that there is probable ground for supposing that the person is detained against his will and without just cause.

[35] It was the view of the learned SCF that s. 366 of the CPC imposes a mandatory obligation that a *habeas corpus* application shall be supported by an affidavit stating where and whom the person is detained with the object of satisfying the court that the detention process was illegal. There are two preconditions imposed under s. 366 of the CPC: (i) the current detaining authority and; (ii) whether the purported detention process is illegal.

[36] The learned SFC further submitted that the 1st respondent is the detaining authority and has the actual custody of the applicant and therefore it is inappropriate or improper to name the 2nd respondent as the detaining authority in the present *habeas corpus* application. Reference was made to the case of *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri Malaysia & Ors (supra)*.

[37] In regard of the 3rd respondent 'Government of Malaysia' 'whether such entity can be construed as 'detaining authority'?. The word 'Government' is nowhere defined in the Federal Constitution or the Interpretation Acts 1948 and 1967 or the Government Proceedings Act 1956. Based on the illustrated Oxford Dictionary 1998, the word 'govern' means 'rule or control with authority; conduct the policy or affairs' thus 'government' means 'the act or manner of governing' 'Kerajaan Malaysia' means 'the institution of Federal Government that rule and control with authority and to conduct her policy and affairs'. It was the learned SFC's contention that the 3rd respondent does not resemble the meaning of 'detaining authority' and therefore does not fit to be named as a party in the present *habeas corpus* application.

[38] On the issue of whether the affidavits of non-detained persons could be accepted in an application for the present *habeas corpus* application, the learned SFC referred to s. 367 of the CPC which states that the affidavit required by s. 366 shall be made by the person detained or allegedly to be detained unless it be shown that by reason of restrained or coercion or other sufficient cause he was unable to make it, in which case it shall be made by some other person. The learned SFC further stated that unless it be shown that by reason of restrained or coercion or other sufficient cause he was unable to make it, in which case it shall be made by some other person.

[39] As for the submissions on the merits of the application, En Najib Zakaria SFC submitted that it is trite law that punitive proceeding and preventive proceeding are two separate and distinct processes which they operate independently. Punitive proceeding is to punish a person for the crime based on admissible evidence beyond reasonable doubt whereas preventive proceeding is to prevent a person from doing acts contemplated under preventive legislation from recurrence of such acts so as to safeguard the public based on hearsay and inadmissible evidence. It was the view of the learned SFC that the alleged and purported non-compliance occurred during punitive proceeding cannot or ought not jeopardize the legality of the subsequent preventive proceeding, be it on the *vice versa* manner. Reference was made to the case of *Lee Kew Sang v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 3 CLJ 914 *inter alia* his lordship Abdul Hamid Mohamad FCJ (as he then was) held as follows:

Two things should not be confused. First, the power of the Attorney General to institute criminal proceedings and secondly, the power of the Minister to make a detention order. The power to institute criminal proceeding lies with the Attorney General and is provided by Art. 145(3) of the Federal Constitution:

On the other hand, power to order detention under the Ordinance lies with the Minister by virtue of s. 4(1) of the Ordinance which has been reproduced.

[40] To fortify its argument that the punitive proceeding and the preventive proceeding are two separate and distinct processes which operate independently, the learned SFC referred to the recent Federal Court case of *Palautah Sinnapayan & Anor v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2010] 2 CLJ 133 where *inter alia* the court held that “in this regard we would categorically state here that preventive detention of a detainee under the Ordinance cannot be equated with punitive detention of an accused person found guilty for committing an offence under the criminal law and that preventive detention made against the appellants in the present case is not subject to art. 7(2) of the Federal Constitution.”

[41] Therefore it was the contention of the learned SFC that issues relating to investigation for criminal proceeding should be disregarded by the court.

- A [42] On the alleged violation of art. 5(3) of the Federal Constitution, the learned SFC submitted that failure to inform the applicant of his right to be engaged by legal practitioner of his own choice, does not entitle the applicant for release from detention. If such violation occurred he should get his remedy elsewhere and not writ of *habeas corpus*. Reference was made to the case of *Mohamed Ezam (supra)*.
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- C [43] On the allegation that the applicant was not given proper medical attention during such detention under Section 117 of the CPC, based on record and the affidavit evidence by the police, the applicant was given due medical attention and prescribed medicine both from UKM hospital or Government Hospital Serdang. The learned SFC further submitted that whether the police were negligent in providing appropriate medical treatment it should not be mentioned in an application for *habeas corpus* application where the remedy for *habeas corpus* is intended to facilitate the release of persons actually in unlawful custody and it is the fact of detention and nothing else which gives the court its jurisdiction.
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- E [44] As regard the allegation of *mala fide* on the part of the police attributable to the conduct of the police arresting the applicant upon furnishing bail, the learned SFC's reply was that the 'rearrest' and detention is legal and valid in the present facts and circumstances. Reference was made to the case of *Karpal Singh v. Inspector General of Police & Ors* [1989] 1 CLJ 134; [1989] 1 CLJ (Rep) 50 where the Supreme Court held *inter alia* that 'the issuance of the second detention order on 16 April 1988 and the contention that thereby the first detention order was revoked by implication did not in any way affect the validity of the first detention order'. In *Rajoo Ramasamy v. Inspector General of Police & Ors* [1990] 1 CLJ 888; [1990] 1 CLJ (Rep) 256 his lordship Hashim Yeop Sani CJ Malaya in his judgment did not find conduct of re-arrest as invalid.
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- H [45] In response to whether the provision of s. 3 (SPM) Act 1985 had been complied with? That is to say whether the applicant had been informed of the grounds of arrest under art. 5(3) of the Constitution and that the further extension of detention as stipulated in s. 3(2)(a), s. 3(2)(b) and s. 3(2)(c) of the DD (SPM) Act 1985 had been complied with.

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[46] The learned SFC referred to the affidavit in reply by Inspector Hazurah binti Ab Talib affirmed on 16 April 2010 at para. 6 and 8 while the arrest report is exhibited at 'NH2' and exh. 'NH1' Form of informing grounds of arrest by the arresting officer. The learned SFC averred that the grounds of arrest had been duly informed to the applicant and the applicant had duly signed the acknowledgement of such explanation.

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[47] In so far as the extension of detention of the applicant pursuant to ss. 3(2)(a); 3(2)(b) and 3(2)(c) of DD (SPM) Act 1985 is concerned strict adherence to the above stated provisions had been complied with. The affidavits by the detaining authority revealed that from the beginning of arrest and detention under ss. 3(2)(a), 3(2)(b) and 3(2)(c) respectively from 24 hours, 48 hours and 14 days by way of reporting demonstrated sequence of reasons indicting the progress of investigation which justified the extension of arrest and detention.

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[48] On the relief sought by the learned counsel for the applicant that the 1st respondent be restrained from re-arresting the applicant after his release, the learned SFC submitted that art. 5(2) of the Constitution is confined to a single remedy and the issuance of writ of *habeas corpus*.

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The Findings Of Court

[49] 5 May 2010 was the day fixed by the court for its decision on whether the applicant's arrest and detention pursuant to s. 3 or any other provisions of the DD (SPM) Act 1985 was unlawful and *ultra vires*. However the court was informed that the Honourable Minister had issued a detention order pursuant to s. 6(1) of the DD (SPM) Act 1985 on 4 May 2010. The learned counsel for the applicant expressed his dissatisfaction that the Honourable Minister had pre-empted the court's decision by issuing the detention order under s. 6(1) of the DD (SPM) Act 1985 and would render the court's decision academic. The learned counsel further said that notwithstanding the decision of this court, the applicant reserved his right to file an appeal to the Federal Court and to file further application of *habeas corpus* to challenge the decision of the Honourable Minister who issued the detention order on 4 May 2010. The learned SFC said he was unaware that the Honourable Minister had issued the detention order until early this morning. Be

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- A that as it may, the learned SFC averred that it does not in any way affect the decision which the court was to deliver as the matter had already been argued and the court should go ahead with its decision.
- B [50] The court is of the view that the matter complained of in this application relates to the issue of whether the arrest on 25 March 2010 was unlawful due to the fact that the jurisdictional facts or prerequisite for the exercise of power to arrest under s. 3(1) of the DD (SPM) Act 1985 have not been fulfilled. In coming to
- C its decision, the court was only concerned with matters which had transpired prior to the issuance of the Ministerial detention order and nothing else matters.
- [51] On the two preliminary issues raised by the respondent
- D namely:
- (i) whether the 2nd and 3rd respondents were properly named as parties in this proceedings;
- E The court is of the considered view that in so far as the 2nd and the 3rd respondents respectively are concerned, both have been improperly and inappropriately named as the detaining authority in the present *habeas corpus* application. The facts reveal that the 1st respondent has the actual custody of the applicant. It is also the court's view that s. 366 of the CPC
- F makes it abundantly clear that it imposes a mandatory obligation that a *habeas corpus* application shall be supported by an affidavit stating where and whom the person is detained which confined the purpose of the said application to the appropriate detaining authority, I think there was no dispute as
- G to whom had detained the applicant. The court is unable to agree with the proposition by the learned counsel that the 1st respondent that is the office of the Inspector-General of Police comes the purview and/or control of the 2nd respondent that is the Home Minister and whose instructions and commands it follows. Similarly, the court disagrees that the 1st respondent
- H being a civil servant is wholly allegiant to the 3rd respondent that is the Government of Malaysia and therefore the element of control is present in terms of decision making process of whether the applicant is detained or otherwise. The court is also
- I not prepared to give a wider and liberal interpretation that based on the above stated view that the 2nd and 3rd respondents have constructive custody over the applicant. In construing ss. 366

and 367 of the CPC respectively, one must look at the intention of Parliament and the intention can be seen by scrutinising the words employed in the sections. In other words whether Parliament intended that the 2nd and 3rd respondents respectively be deemed to be the detaining authority for purposes of *habeas corpus* application. I am not prepared to read words into both sections or to construe them purely by inference or implication and to state that both the 2nd and 3rd respondents respectively were also detaining authority.

[52] The court in this regard would rely on the case of *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri & Ors (supra)* where Augustine Paul FCJ held at p. 628 para b-f and I quote in extenso a passage from the said judgment therein:

The corollary is that a detention order can be made against a person under s. 6(1) even when his detention under s. 3(2) was irregular. *The general rule that a writ of habeas corpus must be directed against the current order of detention therefore applies where a detention under s. 3(1) and (2). It follows that where a detention order has been made under s. 6(1), the writ of habeas corpus must be directed only against that order even if the earlier arrest and detention are irregular.* (emphasis added) This view is supported by *Barnardo v. Ford* [1892] AC 326 where Lord Halsbury said he could not agree to the proposition that if a court is satisfied that illegal detention has ceased before application for writ has been made, nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another. Thus any irregularity in the detention made under s. 3(2) when it has been superseded by one under s. 6(1) is not a relevant matter for consideration. In this regard *The Law of Habeas Corpus*, 2nd edn, by RJ Sharpe says at p 179:

It has been held consistently that the relevant time at which the detention of the prisoner must be justified is the time at which the court considers the return to the writ. This rule means that nothing which has happened before the present cause of detention took effect will be relevant to the issue before the court, unless by reason of some special consideration arising from the particular proceedings.

[53] Based on the reasons as adumbrated above the court ruled that the 2nd and the 3rd respondents have been improperly and inappropriately named as parties to this proceeding and therefore would strike out the applicant's case against both of them respectively.

A (ii) On the second issue raised by the learned SFC, whether the affidavits filed by the applicant's mother and personal assistant respectively could be accepted notwithstanding that the applicant has filed his own affidavit in support:

B The court on the proper interpretation of s. 367 of the CPC was of the view that it is mandatory for the applicant to affirm an affidavit in support of his *habeas corpus* application unless it was shown that by reason of restraint or coercion or sufficient cause that he was unable to make it thus it shall be made by some other reason. This exception which permits other than C the detainee to affirm affidavits in view of the difficulties that may be encountered thus permitting such affidavits to contain hearsay material must be strictly construed. In this respect, D there were no valid reasons to convince the court that the applicant was restrained or coerced or there were other sufficient causes that the applicant was unable to make it, in which case it shall be made by some other person. In any event the applicant's mother had stated in her affidavit that she had been prevented from seeing the applicant whereas the applicant's E personal assistant had alleged coercion by the police. All these alleged allegations and dissatisfaction by both were matters which could be addressed at a different and proper forum but not in the present *habeas corpus* application and therefore the court would not refer to both affidavits respectively in this F proceeding.

[54] In *Syed Ali Mohamed Kutti v. Menteri Dalam Negeri Malaysia & Anor* [1997] 1 LNS 377 Abdul Wahab Patail J (as his lordship then was) had expressed his agreement that such mandatory provision in s. 367 of the CPC to which I would agree with and reaffirmed his G views by reproducing them herein:

H The first objection was non-compliance with section 367 of the Criminal Procedure Code (the Code). Section 366 of the Code provided that every application to bring up a person alleged to illegally or improperly detain in custody shall be supported by affidavit stating where and by whom the person is detained and so far as they are known, the facts relating to such detention, with the object of satisfying the Court that there is probable ground for supposing that such person is detained against his will and without just cause. Section 367 of the Code provides that the person I detained or alleged to be detained unless it is shown that by reason of restraint or coercion or other sufficient cause he is unable to make it, in which case it shall be made by some other person.

The affidavit in support of the application was made by the father. In paragraph 3 of the affidavit, it was merely stated as follows:

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The reason given is that it was difficult or inconvenient to bring a Magistrate or a commissioner of oaths to the detention center. I can do no better than to quote Sir Charles Odgers in *Craies on Statute Law* 5th Ed that there is a general rule of construction applicable to all statutes alike, which is spoken of as construction *ex visceribus actus* - within the four corners of the Act. The office of a good expositor of an Act of Parliament,” said Coke in the *Lincoln College Case* [1595] 3 Co Rep 59 see *Re a Debtor* [1950] Ch 423, 431 per Evershed MR). “is to make construction on all parts together, and not of one part by itself - *Nemo enim aliquam partem recte intelligere potest antequam totum iterum atque iterum periegerit*” And again, in 1 inst 381b, he says: “It is the most natural and genuine exposition of a statute to constitute one part of the statute by another part of the same statute for that best expresseth the meaning of the makers ... and this exposition is *ex visceribus actus*.” But this rule of construction is never allowed to alter the meaning of what is of itself clear and explicit (*Bentley v. Rotherham* [1876] 4 Ch D 588, 592.)

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When interpreting within the Code, the same principle applies within each chapter. In this chapter XXXVI as to “Directions of the Nature of a *Habeas Corpus*” Given the detailed directions, then in the context of section 367 the word “sufficient” qualifying “cause” as used, that is, after the words “by reason of restraint or coercion” must be intended to mean some cause that is out of the control or influence of the applicant. That it is difficult or inconvenient is not therefore a sufficient cause. It must be shown that at least it is impractical or unreasonable to expect it of the applicant. The reason of difficulty or inconvenience given in the supporting affidavit by the father cannot be accepted and the application must fail.

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Even if difficulty or inconvenience is accepted as a “sufficient cause” the next pertinent question is whether the deponent in paragraph 3 has shown or proved any sufficient cause as is required under sections 101(1) and 102 of the Evidence Act 1950. Considering the words of paragraph 3 carefully, that it was “difficult or inconvenient” are assertions made by the deponent. The words express his conclusion or opinion that it was “difficult or inconvenient” to bring a Magistrate or a commissioner for oaths to detention center. It is trite that there is a clear distinction between evidence and an opinion or conclusion. With certain exceptions allowed by law, the Court is only concerned with evidence of

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- A witnesses, not their opinions. Where affidavits are used counsel should be vigilant to ensure that deponents depose as to evidence. In this case, there is nothing to say for example, the deponent had tried to bring a Magistrate or a commissioner for oaths but they had refused or impractical. In the circumstances, the deponent has failed to show evidence of difficulty or inconvenience to support his assertion so as to allow the deponent's affidavit to be used under section 367 to support the *habeas corpus* application. Having so failed, the deponent's affidavit cannot be used as supporting affidavit and the application must also on this ground fail.
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- C [55] The decision in *Syed Ali bin Mohamed Kutti (supra)* was referred to by Augustine Paul J (as his lordship then was) in the case of *Mohd Nazir Badar Shair v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2000] 2 CLJ 805 when his lordship stated as follows:
- D I fully agree with what was expressed by Abdul Wahab Patail J that the words "sufficient cause" appearing in the section must be interpreted to mean "205 some cause that is out of the control or influence of the applicant" This is because the phrase "sufficient cause" is preceded by the word "other" which, on the application of the ejusdem generis rule of construction, must be interpreted in line with the phrase "restraint or coercion" The latter phrase refers to something that is out of the control or influence of a detainee and thus the words "other sufficient cause" must be given a similar meaning. However, I take the affirmative view that affidavit would fall within the words "other sufficient cause" as it is something that is out of his control or influence. But I wholly agree with the learned judge's view that there must be positive evidence of the difficulty and inconvenience. I say this because the contents of an affidavit prepared by a person other than a detainee will contain hearsay material.
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- G Pursuant to Order 41 r. 5 of the RHC information which is not within personal knowledge of a deponent is allowed only when an affidavit is affirmed for interlocutory proceeding and not when a final order is sought (see *Wan Othman bin Datuk Wan Yusof v. Kewangan Utama (M) Bhd* [1993] 2 CLJ 572; *Kassim bin Sulong & Anor v. Guthrie Estates Holdings Ltd & Ors* [1993] 3 MLJ 303, *Zamrud Properties Sdn Bhd v. Pang Mooi Gaid & Anor* [1999] 5 MLJ 180) Where there is an application for a final order it is fatal to rely on affidavits containing hearsay evidence (see *Lim Yew Sing v. Hummel International Sports & Leisure A/s* [1996] 4 CLJ 784). As an application for *habeas corpus* is final in nature the affidavit in support must not contain hearsay material. Ordinarily, therefore an
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affidavit in support of an application for *habeas corpus* must be affirmed by a detainee himself. However, this rule has been modified in the case of *habeas corpus* applications by the section which permits persons other than a detainee to affirm affidavits in view of difficulties that may be encountered thus permitting such affidavits to obtain hearsay material. As the section is an exception to the general rule it must be strictly construed. This view is supported by the use of the word “shown” in the phrase “unless it be shown” appearing in the section which is a reference to proof. In saying this I refer to *Black’s Law Dictionary* 7th Edn which defines the word “show” as:

Thus there must be positive proof of difficulty, inconvenience and financial inability in the detainee himself affirming the affidavit instead of a mere possibility as deposed to in the case. As the reasons advanced by the applicant’s mother to explain why she had to affirm the affidavit do not satisfy the requirements of the section I am unable to accept it. Furthermore, an indorsement to the affidavit is defective as it does not show the dates of swearing and filing it. No application was made for leave of court to use the affidavit. Again the affidavit cannot thus be used, The motion is therefore left without any affidavit to support it.

Decision On The Merits

[56] On the status of the arrest and detention for criminal prosecution prior to the arrest and detention for police investigation under DD (SPM) Act 1985.

[57] That prior to the arrest and detention pursuant to s. 3 of the DD (SPM) Act 1985, the applicant was arrested and detained under s. 117 of the CPC for the purposes of criminal prosecution which the applicant was subsequently charged under s. 12(2) of the DDA, 1952. It was the contention of the applicant that the arrest was illegal.

[58] In the course of the submissions by both parties, the uncontroverted fact is that punitive and preventive proceedings are two separate and distinct processes which operate independently. What can be seen in the instant case is that the law permits the applicant to be detained under the punitive proceeding based on admissible evidence beyond reasonable doubt but at the same time the applicant can also be detained for the purpose of preventive proceeding to prevent him from doing such acts as to safeguard the public based on hearsay and inadmissible evidence.

- A [59] Having identified the two distinct and separate punitive and preventing proceedings, the court is of the view that the re-arrest of the applicant immediately after bail was posted for the charge of possession of 0.24 grams of methamphetamine pursuant to s. 12(3) of the DDA 1952 does not in any way violate the provision of
- B s. 3(1) of the DD (SPM) Act 1985. In *Yeap Hock Seng @ Ah Seng v. Minister for Homes Affair, Malaysia & Ors* [1975] 1 LNS 199 the court held *inter alia* on the facts it appears that the applicant walked out of the courthouse but was immediately apprehended and taken to the Parit Buntar Police Station where Inspector V Doraisamy
- C read and explained to him through an interpreter in the Hokien dialect the order of detention made against him by the Minister under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. It was further held by the court that “In any event the acquittal of an accused person does not necessarily
- D mean that he cannot be acting in a manner prejudicial to the purposes set in s. 4(1) of the Ordinance. The ordinary criminal laws of the country and the Ordinance are not substitutes for each other but are complementary. The constitutional protection against double jeopardy in art. 7(2) of the Constitution and the principle of
- E *autrefois acquit* and convict enacted in s. 302 of the Criminal Procedure Code cannot be applicable as satisfaction under the Ordinance is not a prosecution or trial. Indeed the very essence of preventive detention is incarceration without the benefit of a prosecution or trial and with no offence proved nor any charge
- F formulated or preferred. There is and can be no identity of offence or of prosecution between detention under the Ordinance and a conviction upon trial by a court of law. An order of detention under the Ordinance is not therefore illegal merely because it nullifies a previous order of discharge or acquittal by a Court in a criminal
- G case.”

- [60] On the issue that no affidavit was filed by SAC1 Dato’ Ismail bin Yatim who was alleged to be the decision maker who formed the view as to why the applicant ought to be arrested, I am of the considered opinion that the wordings of s. 3(1) DD (SPM) Act
- H 1985 is imperative that it applies to the arresting officer who arrested and detained the applicant only. I am not prepared to give a liberal interpretation that SAC1 Dato’ Ismail bin Yatim who did not arrest and detain the applicant comes within the ambit of this
- I section. In this regard it was sufficient for both Inspector Nur

Hazurah (encl. 6) and DSP Baharudin (encl. 9) to state in their affidavits that the arrest under s. 3(1) DD (SPM) Act 1985 was carried out based upon instruction and approval of SAC1 Dato' Ismail bin Yatim.

[61] On the complaint by the learned counsel that the police had failed to inform the applicant the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice and therefore it contravenes art. 5(3) of the Constitution, the court is of the view that it was sufficient for the police to inform the applicant that he was under arrest and that there were reasons to believe that the applicant was associated with activities relating to trafficking drugs and that it was necessary in the interest of public order. The court is further convinced that the context of the arrest report exh. 'NH2' and the contents of the Form informing grounds of arrest under art. 5(3) of the Constitution in exh. 'NH1' of the arrest report clearly showed that the arresting officer had informed the applicant. The Form informing the applicant the grounds of his arrest is reproduced for easier reference as follows:

Berdasarkan atas sebab-sebab yang boleh dipercayai bahawa ada alasan-alasan yang munasabah bagi mewajarkan penahanan orang itu di bawah seksyen 6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 kerana pernah ada kaitan dengan aktiviti yang berhubung dengan atau melibatkan pengedaran dadah berbahaya maka pada 25.3.2010 pada jam lebih kurang 1445hrs, saya bersama sepasukan anggota polis daripada Jabatan Siasatan Jenayah Narkotik IPK Kuala Lumpur terdiri daripada D/SM 67373, D/Kpl 82084, 125996, 121615, D/Kpl 145167, K/160137 dan K/160388 telah menangkap satu lelaki Melayu di dalam perkarangan Mahkamah Jalan Duta, Sentul, Kuala Lumpur di bawah seksyen 3(1) Akta yang sama bagi tujuan penyiasatan. Butir-butir seperti berikut:

Nama: Khaeryll Benjamin bin Ibrahim
No K/P: 780917-14-5837
Alamat: A-6-5 Menara Duta 2, Jalan 1/38B, Off Jalan Segambut, 51200 Kuala Lumpur.
Bangsa: Melayu
Tarikh lahir: 17.09.1978
Status: Berkahwin
Pekerjaan: Pelakon

Seterusnya suspek diberitahu sebab-sebab ditangkap dalam Bahasa Malaysia yang mudah difahami

A Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985
Akta 316.

Perkara 5(3) Perlembagaan Persekutuan Kepada Nama Orang Kena
Tangkap: Khaeryll Benjamin Bin Ibrahim

B No K/P: 780917-14-5835

No Lapuran Polis: Sentul 5716/10

* Kami/saya yang bertandatangan di bawah memperakui bahawa

C * Kami/saya pada hari ini 25hb Mac 2010 telah memberitahu kamu
dalam bahasa/loghat Malaysia sebab-sebab kamu ditangkap di
bawah seksyen 3(1) Akta Dadah Berbahaya (Langkah-Langkah
Pencegahan Khas) 1985 pada 25 Mac 2010 jam 1445 hrs Di
Dalam Perkarangan Mahkamah Jalan Duta Sentul Kuala Lumpur.

D * Kerana kami/saya mempunyai sebab mempercayai bahawa ada
alasan-alasan yang mewajarkan penahanan kamu di bawah seksyen
6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas)
1985 kerana kamu pernah

E * ada/sedang ada kaitan dengan aktiviti yang berhubung* dengan/
yang melibatkan pengedaran Dadah berbahaya dan bahawa
kepentingan Ketenteraman Awam kamu perlu ditahan.

[62] On the available evidence, I so hold and it is my judgment
that there was ample evidence to show that Inspector Hazurah binti
F Ab Talib together with SM Yusof bin Zainuddin when effecting the
arrest on the applicant had also informed the grounds of arrest
under art. 5(3) of the Constitution. This can be seen by looking at
the arrest report in exh. 'NH2' and the Form informing the
grounds of arrest in exh. 'NH1' the applicant was indeed informed
G and knew the reasons for his arrest at the court Complex, Kuala
Lumpur. I therefore rule that there was no basis for alleging
otherwise.

[63] As regard the averment by the learned counsel that the police
in arresting and detaining the applicant was actually trying to build
H up a case against the applicant where the media reports by the
police in particular by ACP Kang Chez Chiang at a press
conference said that the police did not have reason to believe that
the applicant was acting for or working with a syndicate. The
learned counsel has placed great emphasis on the case of *Mohamed*
I *Ezam (supra)* and has urged the court to adopt its decision and rule
that the police were merely trying to build up a case against the

applicant. On the strength of *Mohamed Ezam*'s case the applicant ought to be released forthwith because it was a unanimous decision of the Federal Court of a five member bench as compared to *Kam Teck Soon*'s case presided over by a three member bench. Furthermore the learned counsel said that the panel in *Kam Teck Soon* did not touch on the facts of *Mohamed Ezam*'s case and therefore remains good law.

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[64] Not to be outwitted, the learned SFC in reply has urged the court not to adopt the decision in *Mohamed Ezam*'s case but to adopt the decision in *Kam Teck Soon v. Timbalan Menteri Dalam Negeri Malaysia & Ors And Other Appeals* [2003] 1 CLJ 225 which is also a Federal Court case decided after *Mohamed Ezam*'s case on *inter alia* whether the arrest and detention of the appellant by the police had violated the first limb of art. 5(3) of the Constitution in that whether the appellant were informed of the grounds for his arrest. The learned SFC submitted that *Mohamed Ezam*'s case was a case which relates to the enforcement of the police power under the ISA and is distinguishable on the facts.

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[65] I have read the facts of *Mohamed Ezam* and *Kam Teck Soon* respectively and find that in gist the former case dealt with the enforcement of police power under the Internal Security Act 1960 whereas in the latter case it dealt with the issue of violation of the appellant's constitutional right under art. 5(3) of the Constitution and in the context of arrest and detention under s. 3(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 which is quite similar in the nature of arrest and detention effected. The enforcement of the police power in the ISA is not similarly adopted as found in the Dangerous Drugs Act (Special Preventive Measures) 1985. It would be helpful at this juncture to quote a passage in *Mohamed Ezam* by Steven Shim CJSS (as his lordship then was) to understand the difference in respect of the enforcement of police power which can be seen at p. 336-337 as follows:

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In the exercise of his discretion, he (Minister) need not necessarily have to consider and rely on police investigation. This is implicit in the very nature of an unfettered discretion. There may well be other public considerations of a political social or economic nature having an impact on national security which are purely within his having an impact on national security which are purely within his peculiar

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- A knowledge and which he considers relevant to his decision. Furthermore police investigation under s. 73 may stop short of submission or reference to the Minister where circumstances reveal insufficient to warrant the continued detention of the detention of the detainee. In such a case the matter would quite conceivably never reach the door of the Minister. Does it then follow that the power of the Minister under s. 8 have become impotent and stagnant? Clearly if it was the intention of Parliament to impose a mandatory obligation on the part of the Minister to consider the police investigation under s. 73 before he could issue a detention order under s. 8. Parliament would have expressly provided for it as she did in the Dangerous Drugs (Preventive Measures) Act 1985 wherein s. 3(1) states:
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- 3(1) Any police officer may without warrant, arrest and detain for the purpose of investigation any person in respect of whom he has reasons to believe there are grounds which could justify his contention under subsection (1) of section 6.
- D
- 6(1) Whenever the Minister, after considering:
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- (a) the complete report of investigation submitted under subsection (3) of section 3; and
- (b) the report of the inquiry Officer submitted under subsection (4) of section 5,
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- Is satisfied with respect to any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained by order (hereinafter referred to as a "detention order") direct that such person be detained for a period not exceeding two years from the date of such order.
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- Quite clearly, in the case where the Minister is deciding whether or not to issue a detention order under the Dangerous Drugs (Preventive Measures) Act, he has to consider the police investigations or reports submitted to him. There is a mandatory obligation for him to do so. Such express provisions are conspicuously absent in s. 8 or s. 73 of the Act.
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- I [66] It is my considered opinion that in the instant case Parliament has expressly given the police the power to arrest any person including the applicant for the purpose of investigation in respect of whom he has reasons to believe that there are grounds which could justify his detention under s. 6(1) which is the Minister's detention order. It is also quite clear that the Minister in deciding whether or not to issue a detention under the DD

(SPM) Act 1985, has to consider the police investigations or reports submitted to him. This is mandatory for him to do so. Such express provisions are conspicuously missing in s. 8 or s. 73 of the ISA where the Minister may issue detention order based from whatever information he received.

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[67] In *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645 it was held that if there was a conflict between two Federal Court decisions, on a point of law, the later decision prevails over the earlier decision. The court also held that the effect or weight of a decision of a panel of the Federal Court comprising more than three members or a 'full court' and that of an ordinary constituted quorum comprising three members is the same.

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[68] Based on the decision in *Dalip Bhagwan Singh's (supra)*, I would say that on the facts in the instant case I would adopt the reasoning by Steven Shim CJSS when his lordship made a distinction in the enforcement of police power in s. 8 or s. 73 of the ISA with that of Dangerous Drugs (Special Preventive Measures) Act 1985 and the intention of Parliament. I would therefore say that *Mohamed Ezam (supra)* was decided based on its own facts under the ISA whereas *Kam Teck Soon* was an arrest and detention under s. 3(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 which is quite similar in nature with regard to police investigation and Ministerial detention order.

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[69] It was decided in *Muhammad Jailani Kasim v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 4 CLJ 687, that "it must be reiterated that the reports that the Minister must consider are only a prerequisite to the making of the detention order under s. 6(1) of the Act. The reports specified in s. 6(1)(a) and (b) of the Act plays a very significant role in the making of the detention order against a person. The Minister must consider these reports before making a detention order. There are therefore pre-conditions to the exercise of power under s. 6(1) of the Act. They are part of the decision making process and not the decision itself."

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[70] There was also an allegation that the Form used by the investigating police officer under s. 3 of the DDA (SPM) 1985 was not a prescribed form under the DDA (SPM) 1985. In this regard I would agree with the view expressed by the learned SFC in that

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- A s. 62 of Interpretation Acts 1948 & 1967 protect prescribed form from being invalidated for trivial reasons. Section 62 of the Interpretation Act is reproduced for easier reference:
62. Deviation from forms:
- B Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead.
- C [71] In *Lim Kean Hong v. Timbalan Menteri Dalam Negeri Malaysia & Another Case* [1990] 1 CLJ 1161; [1990] 2 CLJ (Rep) 378 where his lordship KG Vohrah J (as his lordship then was) enunciated that by analogy since there is no prescribed form envisaged under provision of s. 3(2) Dangerous Drugs (Special Preventive Measures) Act 1985, therefore the police officer who authorized the extension of such detention provided by the related provision can do so not necessarily in writing form but in other form such as oral or by way of affidavit evidence to reflect that it was done orally.
- E [72] As regard the allegation of failure to render proper medical treatment to the applicant, the court is of the considered view that it does not entitle the applicant the writ of *habeas corpus*. In any event based on record and the affidavit evidence by the police, the applicant was given due medical attention and prescribed medicine both from UKM Hospital or Government Hospital or the Government Hospital in Serdang. In *Uthayakumar Ponnusamy v. Menteri Keselamatan Dalam Negeri Malaysia & Anor* [2009] 1 CLJ 546, the Court stated that “the remedy of *habeas corpus* is intended to facilitate the release of persons actually in lawful custody and it is the fact of detention and nothing else which gives the court its jurisdiction.”
- G [73] The next issue for the court’s determination was the allegation by the learned counsel of inference of *mala fide* on the part of the police when they rearrested the applicant and held a press conference to inform the public. Reference was made to *Mohamed Ezam (supra)* where the court agreed with the submission of the learned counsel that the detentions were for ulterior purposes and unconnected with national security. The learned counsel further held that in the instant case the applicant was arrested not because
- I he had done or was doing something which can be detrimental to

public order. The danger was non-existent and the need for him to be arrested under s. 3(1) of the DD (SPM) Act 1985 did not arise. The intention of the police from the beginning was to investigate and charge him under s. 39B of the DDA.

[74] I am of the view that the rearrest and the detention of the applicant and the holding of the press conference by the police whilst the investigation was still on going did not in any way establish the *mala fide* on the part of the detaining authority. In *Yeap Hock Seng @ Ah Seng v. Minister of Home Affairs Malaysia* (*supra*) the court held, *inter alia*, that the onus of proving *mala fide* on the part of the detaining authority is on the applicant and is extremely difficult to discharge as what is required is proof of improper or bad motive in order to invalidate the detention or order *mala fide* and not mere suspicions and (ii) where an order for detention is challenged on the ground of *mala fide*, what has got to be made out is not the want of *bona fide* on the part of the police, but the want of *bona fide* as well as the non-application of mind on the part of the detaining authority which for this purpose must be taken to be different from the police.

[75] In the instant case there was no affidavit by the applicant to show that the police investigation was not vigorously pursued. In fact on affidavit evidence it shows that the genuine effort by the police to curb drug-related activities which fall within the scope of DD (SPM) Act 1985. I find that there was no basis for alleging *mala fide* on the part of the police in the rearrest of the applicant and dismissed this fear of the applicant as unfounded.

[76] In conclusion and based on the reasons as adumbrated above and in all the circumstances I find that the arrest and detention of the applicant was lawful and in compliance with all the provisions of the Constitution and the Dangerous Drugs (Special Preventive Measures) Act 1985. I therefore dismissed the applicant's application in encl. 4.